Supreme Court, U.S.
FILED
AUG 31 200
OFFICE OF THE CLERK

No. 01-196

IN THE

Supreme Court of the United States

ONOFRE SERNA,

Petitioner,

v.

CITY OF SAN ANTONIO and AL PHILIPPUS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

JACQUELINE M. STROH
Counsel of Record
CROFTS & CALLAWAY
A PROFESSIONAL CORPORATION
112 East Pecan Street
Suite 800
San Antonio, TX 78205-1517
(210) 299-0289

DEBORAH LYNNE KLEIN
OFFICE OF THE CITY ATTORNEY
ASSISTANT CITY ATTORNEY III
P.O. Box 83996
San Antonio, TX 78283-3966
(210) 207-8950

MARK KOSANOVICH
FITZPATRICK & KOSANOVICH, P.C.
P.O. Box 831121
San Antonio, Texas 78283
(210) 207-7259

Attorneys for Respondents

169167

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

Whether Petitioner waived the issue whether a plaintiff must demonstrate, as part of a First Amendment retaliation claim pursuant to section 1983, that he suffered an adverse employment action because Petitioner raised the issue for the first time in his petition for writ of certiorari to this Court.

Whether the precedent of lower appellate courts, following this Court's holdings, have correctly inquired, in the context of First Amendment retaliation claims arising out of public employment, whether the plaintiff suffered an adverse personnel action.

Whether this Court's decision in *Reeves*, which merely reaffirmed the standard of review set forth in *Anderson v. Liberty Lobby*, requires a reviewing court to accept a plaintiff's speculation and subjective perception of harm as evidence of an adverse employment action, and whether the Fifth Circuit fully complied with *Reeves*'s directives.

Whether Petitioner has waived any argument regarding the adverse employment action analysis conducted by the Fifth Circuit, apart from its inclusion as an element in the first instance, and whether, in any event, the Fifth Circuit's analysis fulfills the constitutional aims of section 1983.

Whether Petitioner has waived any argument regarding the timing of Respondents' motion for judgment as a matter of law, made before the jury returned a verdict, and whether, in any event, Respondents' motion complied with the purposes of Rule 50 and was thus properly considered.

Whether the Fifth Circuit's judgment can and should be affirmed on any of a number of other legal grounds asserted by Respondents below.

LIST OF PARTIES

Respondents are satisfied with Petitioner's list of the parties and attorneys involved, with one exception. Since his appearance on behalf of Respondents below, Wallace B. Jefferson has been appointed as an associate justice to the Supreme Court of Texas and is no longer serving as Respondents' counsel.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties	ii
Table of Contents	iii
Table of Cited Authorities	vi
Statutes Involved	1
Statement of the Case	1
A. Statement of Facts	1
1. Chief Philippus Has the Discretion to Transfer Law Enforcement Officers to Further Public Safety and Department Efficiency	1
2. Conflicts Arose Within the Downtown Foot and Bike Patrol Unit, the Unit to which Officer Serna Had Been Assigned	2
3. Chief Philippus Created a Special Committee to Investigate the Conflict in the DFU	3
4. The Committee Concluded that Officer Serna Should Be Transferred Because He Was a Disruptive Presence in the DFU; the Transfer Was Not Based on Any Alleged Reports of Violations of Law	4

Contents

Page

5. Petitioner Persists in His Quest to Try Lieutenant Griffin Rather Than Petitioner's Section 1983 Claim 6

B. Proceedings Below 8

Reasons for Denying the Writ 9

1. Serna Has Waived Any Argument Regarding the Propriety of an Adverse Employment Element as Part of His Burden of Proof for a First Amendment Retaliation Claim Under 42 U.S.C. § 1983 by Raising It for the First Time to This Court 10

2. All Eleven Federal Circuit Courts, Based on this Court's Precedent, Have Held that in Order to State a First Amendment Retaliation Claim under 42 U.S.C. § 1983, the Complainant Must Demonstrate that He Suffered an Adverse Employment Action 11

3. Serna Argues that the Fifth Circuit Failed to Properly Apply *Reeves*, Though His Ultimate Complaint Is That the Fifth Circuit Refused to Indulge in Speculation and to Base Its Decision on Serna's Subjective Perception of Harm 15

4. Serna Has Failed to Properly Raise an Issue Regarding the Timing of Respondents' Rule 50 Motion 20

Contents

Page

5. Respondents Raised a Number of Other Grounds Below, Any One of Which Would Support the Fifth Circuit's Decision and Judgment 21

Conclusion 26

TABLE OF CITED AUTHORITIES

Page

Cases:

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) ..... i, 9, 15

Bart v. Telford, 677 F.2d 622 (7th Cir. 1982) 13

Bechtel v. City of Belton, Missouri, 250 F.3d 1157 (8th Cir. 2001) 11

Bishop v. Wood, 426 U.S. 341 (1976) 14

Blair v. Oesterlein Mach. Co., 275 U.S. 220 (1927) 10

Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987) 23

Boeing Co. v. Shipman, 411 F.2d 365 (5th Cir. 1969) 15

Breaux v. City of Garland, 205 F.3d 150 (5th Cir.), *cert. denied*, 531 U.S. 816 (2000) 11

Chandris, Inc. v. Latsis, 515 U.S. 347 (1995) 19

Clark v. Long, 255 F.3d 555 (8th Cir. 2001) 17

Click v. Copeland, 970 F.2d 106 (5th Cir. 1992) ... 14, 20

Colson v. Grohman, 174 F.3d 498 (5th Cir. 1999) ... 13

Connick v. Myers, 461 U.S. 138 (1983) 12, 14, 22

Cited Authorities

	Page
Daniels v. Williams, 474 U.S. 327 (1986)	20
Davis v. United States, 417 U.S. 333 (1974)	20
Duignan v. United States, 274 U.S. 195 (1927)	10
Edwards v. City of Goldsboro, 178 F.3d 231 (4th Cir. 1999)	11
Figueroa-Serrano v. Ramos-Alverio, 221 F.3d 1 (1st Cir. 2000)	11
Fogarty v. Boles, 121 F.3d 886 (3d Cir. 1997)	11
Forsyth v. City of Dallas, 91 F.3d 769 (5th Cir. 1996), *cert. denied*, 522 U.S. 816 (1997)	20
Fyfe v. Curlee, 902 F.2d 401 (5th Cir.), *cert. denied*, 498 U.S. 940 (1990)	20
Garber v. New York City Police Dep't, 159 F.3d 1346 (2d Cir. 1998)	17
Givhan v. Western Line Consol. Sch. Dist., 439 U.S. 410 (1979)	12
Gorman-Bakos v. Cornell Co-op Extension of Schenectady County, 252 F.3d 545 (2d Cir. 2001)	11
Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989)	10

Cited Authorities

Page

Hampton v. Borough of Tinton Falls Police Dep't, 98 F.3d 107 (3d Cir. 1996) 20

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 25

Harlston v. McDonnell Douglas Corp., 37 F.3d 379 (8th Cir. 1994) 17

Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993) ... 17

Heckler v. Campbell, 461 U.S. 458 (1983) 10

Hill v. Clifton, 74 F.3d 1150 (11th Cir. 1996) 22

Ingraham v. Wright, 430 U.S. 651 (1977) 13

Intercity Maint. Co. v. Local 254, Service Employees Int'l. Union, 241 F.3d 82 (1st Cir.), *petition for cert. filed*, 70 U.S.L.W. 3036 (U.S. May 14, 2001) (No. 00-1764) 17

Izumi Seimitsu Kogyo Kabushiki Kaisha v. United States Philips Corp., 510 U.S. 27 (1993) 19, 20

Kuykendall v. United Gas Pipe Line Co., 208 F.2d 921 (5th Cir. 1953) 16

Laird v. Tatum, 408 U.S. 1 (1972) 17

Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387 (1923) 19, 20

Cited Authorities

	Page
Lybrook v. Members of Farmington Mun. Schs. Bd. of Educ., 232 F.3d 1334 (10th Cir. 2000)	13
Magnum Import Co. v. Coty, 262 U.S. 159 (1923)	19
Malley v. Briggs, 475 U.S. 335 (1986)	25
McGill v. Board of Educ., 602 F.2d 774 (7th Cir. 1979)	20
McGoldrick v. Compagnie Generale Transatlantique, 309 U.S. 430 (1940)	10
McMillian v. Monroe County, Ala., 520 U.S. 781 (1997)	22
McPhaul v. Board of Comm'rs of Madison County, 226 F.3d 558 (7th Cir. 2000), *cert. denied*, 121 S. Ct. 1358 (2001)	11
Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299 (1986)	25
Monell v. City Dep't of Soc. Servs. of City of New York, 436 U.S. 658 (1978)	21
Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977)	12
Nunez v. City of Los Angeles, 147 F.3d 867 (9th Cir. 1998)	11

Cited Authorities

Page

Pennsylvania R. Co. v. Chamberlain, 288 U.S. 333 (1933) 17

Perry v. Sindermann, 408 U.S. 593 (1972) 12

Pickering v. Board of Educ., 391 U.S. 563 (1968) 12, 13, 14, 23

Pierce v. Texas Dep't of Criminal Justice, 37 F.3d 1146 (5th Cir. 1994), *cert. denied*, 514 U.S. 1107 (1995) 14

Powers v. Summers, 226 F.3d 815 (7th Cir. 2000) ... 11

Quinn v. Southwest Wood Prods., Inc., 597 F.2d 1018 (5th Cir. 1979) 21

Ramos v. Davis & Geck, Inc., 167 F.3d 727 (1st Cir. 1999) 17

Rankin v. McPherson, 483 U.S. 378 (1987) 12, 13

Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000) ..... i, 9, 15, 16

Rice v. Sioux City Mem'l. Park Cemetery, 349 U.S. 70 (1955) 18, 19

Roberts v. United States Jaycees, 468 U.S. 609 (1984) 22

Rogers v. Miller, 57 F.3d 986 (11th Cir. 1995) 12

Cited Authorities

Page

Rutan v. Republican Party of Illinois, 497 U.S. 62 (1990) 12, 13

Sharp v. City of Houston, 164 F.3d 923 (5th Cir. 1999) 19

Southard v. Texas Bd. of Criminal Justice, 114 F.3d 539 (5th Cir. 1997) 19, 20

Sowards v. Loudon County, Tenn., 203 F.3d 426 (6th Cir.), *cert. denied*, 531 U.S. 875 (2000) ... 11

Streber v. Hunter, 221 F.3d 701 (5th Cir. 2000) ... 21

Thomsen v. Romeis, 198 F.3d 1022 (7th Cir. 2000) 11

Thurber Corp. v. Fairchild Motor Corp., 269 F.2d 841 (5th Cir. 1959) 16

United States v. Alvarez-Sanchez, 511 U.S. 350 (1994) 10

United States v. Bayer, 331 U.S. 532 (1947) 16

United States v. Johnston, 268 U.S. 220 (1925) ... 19

Waters v. Churchill, 511 U.S. 661 (1994) 12

Wilcox v. State Farm Mut. Auto. Ins. Co., 253 F.3d 1069 (8th Cir. 2001) 16

Page

Withiam v. Baptist Health Care of Oklahoma, Inc., 98 F.3d 581 (10th Cir. 1996) 11, 12

Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) 12

United States Constitution:

U.S. Const., Amend. I ..... *passim*

Statutes:

42 U.S.C. § 1681, *et seq.* 1

42 U.S.C. § 1983 ..... *passim*

TEX. GOV'T CODE § 554.002 (Vernon Supp. 2001) ... 1

Rules:

Fed. R. Civ. P. 50 ..... i, 15, 16, 17, 20

Fed. R. Civ. P. 56 15

S. Ct. R. 14.1(a) 19

Respondents City of San Antonio and Al Philippus respectfully request that this Court deny the petition for writ of certiorari seeking review of the Fifth Circuit's opinion in this case. That opinion is reported at 244 F.3d 479 (5th Cir. 2001).

STATUTES INVOLVED

Petitioner asserts in his statement of jurisdiction that his claims were cognizable in the district court pursuant to 42 U.S.C. § 1681, *et seq.* for First Amendment violations. Petitioner also includes 42 U.S.C. § 1681 as one of the statutes involved. Respondents have been unable to locate such a provision, and Petitioner's complaint in the district court never raised a claim pursuant to this provision. (CR 4-12, 466-83) Petitioner also lists Texas Government Code § 554.002 as a relevant provision, but nowhere in his petition for writ of certiorari does Petitioner complain about the Fifth Circuit's ruling with respect to his state law whistleblower claim. Instead, his entire briefing focuses on the claim he asserted pursuant to 42 U.S.C. § 1983.

STATEMENT OF THE CASE

A. Statement of Facts

1. Chief Philippus Has the Discretion to Transfer Law Enforcement Officers to Further Public Safety and Department Efficiency

This litigation arises out of the employment of Petitioner Onofre Serna by the San Antonio Police Department ("SAPD") and specifically concerns events that occurred in the Downtown Foot and Bike Patrol Unit ("DFU") in 1995 and 1996. Respondent Al Philippus is the Chief of Police for the SAPD, and he has held that position since 1995. (RR 798) As the Chief of Police, Philippus is given the discretion to transfer officers within the SAPD for the

betterment of the department. (RR 736-37; PX 2) This discretion is granted to Chief Philippus through the terms of the Collective Bargaining Agreement entered into between the City of San Antonio and the San Antonio Police Officers' Association. (RR 737; PX 2)

2. Conflicts Arose Within the Downtown Foot and Bike Patrol Unit, the Unit to which Officer Serna Had Been Assigned

Onofre Serna has been a member of the SAPD since 1985. (RR 140) In 1987, Serna was transferred to the DFU evening shift. (RR 141) At all times relevant to the lawsuit, the DFU was commanded by Captain Rudy Vernon and Lieutenant Harry Griffin. (RR 147, 243-44) The evening shift was supervised by Sergeant Tom White and Sergeant Hollis Hester. (RR 84-85, 92) The purpose and philosophy behind the DFU was to create a highly visible police presence in the downtown area to discourage crime and to create a safe environment for citizens and visitors to the downtown area. (RR 1331-32) A major policing concern was gang activity, which created problems in the form of violence among gang members, assaults on others, theft, robbery, public intoxication, and disorderly conduct. (RR 234, 1334)

Beginning in 1995, a subset of the DFU officers began complaining of Griffin's management style. (RR 80, 1531) Some officers disagreed with Griffin's policing philosophy; Griffin criticized officers' performance of their duties. (RR 1345-46, 1531, 1636) Griffin, for example, received complaints from local citizens and business owners that Officers Lockamy and Aguilar were not paying attention to their jobs and were, instead, socializing with women in the downtown area. (RR 1345-46, 1348-49) A few officers complained that Griffin made racial slurs and other inappropriate comments and that Griffin was cold and impersonal. (RR 115, 423, 462, 492-93)

In July 1995, four officers, (Aguilar, Lockamy, Vela, and Johnson), failed to come to Griffin's assistance during a juvenile disturbance. (RR 1350-51) After calling for assistance more than once, backup officers finally arrived. (RR 1351) As Griffin was walking back to his car, he noticed that Officers Lockamy and Aguilar were directly across the street from him but never came to his assistance, their excuse being that they did not think he was in trouble. (RR 1352-53) He also learned that Officers Johnson and Vela were on duty at the time but also did not come to his assistance. (RR 1353) All four officers were then placed on special assignment by Griffin and subsequently filed complaints with the EEO liaison, Officer Linda Taylor. (RR 1354-56; DX 1; PX 4, 5) Those EEO complaints alleged that Griffin was discriminating against the officers based upon their national origin. (PX 4, 5) Serna did not file any such complaint.

After the filing of the EEO complaints, a meeting was held on July 27, 1995 between the DFU patrol officers and Griffin to air grievances. (RR 1356) At the meeting, some of the officers complained about Griffin's policing philosophy and criticized the occurrence of practical jokes in the unit. (RR 544-45, 894-95, 997-98, 1626-27) After this meeting, the tensions in the DFU between officers and their supervisors continued to grow, coming to a head on the evening of May 28, 1996, when an alleged altercation occurred between another officer and Sergeant White. (RR 1361, 1367-68) These occurrences prompted Chief Philippus to take action.

3. Chief Philippus Created a Special Committee to Investigate the Conflict in the DFU

Chief Philippus created a blue ribbon committee ("the Committee") to investigate the DFU as a whole and expose any problems in the unit. (RR 769, 771, 821; PX 12) The Committee was headed by Deputy Chief Albert Ortiz.

(RR 769-70, 821; PX 12) Ortiz selected other members of the Committee based on their stellar reputations. (RR 855-56) The Committee did not focus its attention on any singular member of the DFU. (RR 822, 864, 1426, 1429, 1444, 1445, 1489, 1524-25, 1572, 1589-90, 1625) Instead, each officer of the DFU was questioned separately by a person of the next higher rank. (RR 862) The Committee asked questions of a general nature, seeking a broad picture of the problems in the DFU. (RR 863-64, 1427, 1431, 1488, 1490-92, 1522-23, 1572, 1589, 1626)

4. The Committee Concluded that Officer Serna Should Be Transferred Because He Was a Disruptive Presence in the DFU; the Transfer Was Not Based on Any Alleged Reports of Violations of Law

After completing the interviews, the Committee reconvened to discuss its findings and to make suggestions on a proposed course of remedial action. (RR 773, 826, 860) Chief Philippus did not meet with the committee members until after they had completed their investigation. (RR 824, 1440) The Committee found several management problems in the unit. (RR 775, 1432-36, 1493-96, 1525-26, 1574-76; PX 3; DX 10) The Committee found that Officers Lucio Aguilar and George Lockamy were viewed by many as having disruptive influences in the DFU, and that Serna had frequently encouraged their disruptive conduct. (RR 783-84, 1436-38, 1492-93, 1526-27; PX 3; DX 10) The Committee also noted that Serna's fellow officers specifically named him as a source of trouble at the DFU. (RR 783, 1436-39, 1492-93, 1496, 1526, 1527-29, 1599-1600; PX 3; DX 10) For example, those interviewed by the Committee stated that Serna used peer pressure to persuade other officers to bring down productivity and that he showed disrespect for his supervisors. (RR 1439, 1493, 1496, 1528) Many officers described Serna as encouraging

insubordination and behaving in an unprofessional and childlike manner. (RR 1174-77, 1191, 1193-94, 1229, 1238, 1247-50, 1284-87) The complaints made by Serna with respect to Griffin and overheard by other officers had nothing to do with alleged civil rights violations; Serna sounded like a disgruntled employee rather than a champion of civil rights. Based on these findings, the Committee determined that the transfer of Serna from the DFU would be in the best interest of the department. (RR 788-89, 1441, 1497, 1578-79, 1601) The Committee also recommended the transfer of several other officers, including Griffin, Aguilar, Lockamy, and Sergeant White. (RR 1441-42, 1447-48, 1497, 1558, 1601)

Based on these recommendations, Chief Philippus, under the authority granted by the Collective Bargaining Agreement, ordered the transfers. (RR 788-89, 826, 1325-26, 1451-52) Serna was transferred on July 3, 1996. (RR 163; DX 16; RE 17) Neither the recommendations of the Committee nor the action taken by Chief Philippus in transferring Serna was based on any alleged reports by Serna of violations of law or in retaliation for engaging in constitutionally-protected activity. (RR 788-89, 795-96, 826, 829, 848, 1445-46, 1450-51, 1482, 1497-1500, 1517-18, 1528, 1543-44, 1578, 1599-1601, 1632-33) Following his transfer, the Committee prepared a summary report of its findings. (PX 3; DX 10)

Serna filed a grievance with the San Antonio Police Officers' Association ("SAPOA") on July 24, 1996. (PX 18) Although the basis of this litigation is Serna's transfer, Serna had not, as of the time of trial, made a request for transfer from his current assignment. (RR 338-39) Following the transfers recommended by the Committee, the problems in the DFU subsided, and the unit began to run efficiently. (RR 829-30, 1451-52, 1580, 1633-34)

5. Petitioner Persists in His Quest to Try Lieutenant Griffin Rather Than Petitioner's Section 1983 Claim

Onofre Serna initiated this litigation claiming that he was retaliated against because he made reports of violations of law and for exercising his First Amendment rights of freedom of speech and freedom of association. (CR 4-12, 466-83) The majority of the testimony before the trial court, however, had nothing to do with Serna's claim of retaliation.

The testimony at trial centered on the following accusations: that Griffin had a different management style than his predecessors; that Griffin preferred the officers on the day shift; that the night shift felt like stepchildren; that Griffin referenced a Time magazine cover entitled "male, white and scared"; and that Griffin made racial slurs. (RR 79-81, 88-89, 91, 115) Other complaints focused on the policing philosophies of Griffin, that he referred to the night shift as lazy, that Griffin had favorites in the department, and that he made offensive remarks. (RR 378, 383, 386-87, 423-26, 462, 465) Some witnesses complained about Griffin's management style and personal experiences with Griffin. (RR 461-62, 581-87, 593-96, 588-93) One officer commented on Griffin's disparate treatment of the daylight shift and the evening shift and on the lieutenant's cold and impersonal nature, while another testified about problems in obtaining a lock for the women's locker room. (RR 462, 492-93, 673-76) The accusations against Griffin — that he encouraged the removal of gangs and the homeless from the downtown area — peppered and were interwoven with the overwhelming aim of the trial testimony, which was to air personal grievances against Griffin.

The great majority of the time spent questioning Chief Philippus concerned the same orders and instructions alleged to have been given by Griffin; questioning also focused on

the Chief's failure to investigate the allegations made against Griffin and whether the Chief was correct in his determination that the DFU was not performing its proactive function. (RR 759-69, 831-41, 850) Serna's questioning of Chief Philippus had nothing at all to do with his reasons for Serna's transfer.

Serna himself testified that his problems with Griffin stemmed, at least in part, from Griffin's "always coming down on us because he wanted us to produce numbers." (RR 223) Later, he testified that "we were the stepchildren of the Foot Patrol, our lieutenant at that time, which was Lieutenant Griffin, would do whatever he could to make our shift as uncomfortable as possible." (RR 247) Serna continued to complain about Griffin's comparing the day shift with the night shift and that he was "constantly on us." (RR 286-87) Other witnesses were questioned about their failure to investigate the allegations against Griffin, the manner in which they conducted the Blue Ribbon Committee's investigation, and about squabbles between Griffin and other officers. (RR 868-75, 905, 909-11, 917-20) The problems identified by the Committee were human relations problems and management issues within the DFU. (RR 1479, 1594-95)

Serna's witnesses provided no information relative to Serna, any complaints he may have made, or the reason for his transfer from the DFU. Witness after witness admitted that they had no personal knowledge why Serna was transferred and could not speak about any retaliation or any reports Serna may have made regarding violations of the law. (RR 387-89, 408, 412, 431-32, 483-85, 535, 546-47, 566-67, 666, 669, 704-05) Thus, Serna, contrary to trying any claims of retaliation against him in violation of either the Texas Whistleblower Act or the federal constitution, was attempting to have the jury rule on internal employment squabbles and the actions taken by Chief Philippus to deal

with them. There is no evidence that the Chief's decision to transfer Serna was precipitated by Serna's speech, his preclusion from associating with other officers, or his reporting illegal orders by superiors.

B. Proceedings Below

Petitioner filed suit in state district court against the City of San Antonio alleging a violation of the Texas Whistleblower statute. (CR 1-3) He alleged that the City retaliated against him by transferring him from the Downtown Foot and Bike Patrol Unit of the San Antonio Police Department for reporting alleged violations of law by Lieutenant Harry Griffin. (CR 4-12, 466-83) Petitioner later amended his state court petition to join Chief of Police Al Philippus in the suit and assert a cause of action for retaliation for the exercise of his First Amendment rights of free speech, freedom of association, and substantive due process. Respondents timely removed the case to federal court. (CR 1-12, 466-83) Petitioner also pled that Respondent Philippus deprived him of equal protection, due process rights, and state constitutional rights. (CR 4-12, 466-83) All claims but those based on the First Amendment and the Texas Whistleblower statute were disposed of by summary judgment. (CR 443-57)

Those claims proceeded to trial, and the jury returned a verdict for Petitioner. (CR 778-89) Prior to the rendition of the jury's verdict, Respondents made a motion for judgment as a matter of law, which the district court considered, expressly overruling Petitioner's claims of waiver. (RR 1795) The jury awarded Petitioner a total of $500,000, awarding an equal sum for the Whistleblower and First Amendment claims. (CR 778-89) The total award was later reduced by the district court to $475,000. (CR 779) Respondents timely filed their post-judgment motions, which were denied by the district court. (CR 822-37, 924-28, 1037-59, 1102)

Respondents then appealed to the United States Court of Appeals for the Fifth Circuit. (CR 1103-05, 1256-58, 1364-67) A three-judge panel of the Fifth Circuit reversed the trial court's judgment. The panel held that Petitioner failed to satisfy his burden in both his First Amendment claim and his state whistleblower action to establish that the government took an adverse employment action against him in retaliation for certain complaints and association with other officers. *Serna v. City of San Antonio*, 244 F.3d 479 (5th Cir. 2001). Petitioner filed a petition for rehearing and a petition for rehearing *en banc*, both of which were denied.

REASONS FOR DENYING THE WRIT

This Court should deny Serna's petition for writ of certiorari because: (1) Serna has waived any argument against the inclusion of an adverse personnel action as an element of his First Amendment retaliation claim under 42 U.S.C. § 1983 by raising it for the first time in this Court; (2) there is no conflict in decisional case law because all eleven federal circuit courts have determined that in order for a plaintiff to state a First Amendment retaliation claim pursuant to 42 U.S.C. § 1983, the plaintiff must demonstrate that he suffered a constitutional injury, *i.e.*, an adverse employment action; (3) there is no conflict with this Court's precedent because the decisions of lower appellate courts, including cases decided by the Fifth Circuit, were based on opinions from this Court cautioning that federal courts have no business monitoring a public employer's employment decisions absent injury to a constitutional degree; and (4) this Court's decision in *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000) was an affirmance of the standard of review as set forth in *Anderson v. Liberty Lobby*, which would not, contrary to Serna's representation, require a reviewing court to indulge and treat as evidence a complainant's subjective perception of harm.

1. Serna Has Waived Any Argument Regarding the Propriety of an Adverse Employment Element as Part of His Burden of Proof for a First Amendment Retaliation Claim Under 42 U.S.C. § 1983 by Raising It for the First Time to This Court

"This court sits as a court of review." *Duignan v. United States*, 274 U.S. 195, 200 (1927). "It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed." *Id.* Neither in the district court nor in the Fifth Circuit did Petitioner complain about the inclusion of an adverse personnel element as part of his burden of proof, though the issue of whether Serna's lateral transfer constituted an adverse personnel action was briefed by both parties in both courts. *See id.* (refusing to review constitutional issue not raised in lower appellate court).[1] This Court has steadfastly adhered to this principle, including contexts where the new argument was being raised as an alternative ground for affirmance of the lower court's judgment. *See, e.g., United States v. Alvarez-Sanchez*, 511 U.S. 350, 360 n.5 (1994) (same); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 38-39 (1989) (same); *Heckler v. Campbell*, 461 U.S. 458, 469 n.12 (1983) (same); *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 433-34 (1940); *Blair v. Oesterlein Mach. Co.*, 275 U.S. 220, 225 (1927) (same).

There is nothing exceptional about this case that would allow Petitioner to raise an issue for the first time in this Court, depriving the lower courts of an opportunity to review the issue and depriving Respondents of their opportunity to consider and counter the argument. Petitioner did not raise the issue in the district court, and the issue was never raised in the lower appellate court, though Serna briefed whether he suffered a

---

1. In fact, as noted in the Fifth Circuit's decision, Serna argued that the lower appellate court should define adverse transfer for the purposes of the Texas Whistleblower statute by looking to its case law under 42 U.S.C. § 1983. *Serna*, 244 F.3d at 483.

constitutional injury with reference to existing Fifth Circuit precedent and the adverse employment action element. Even if this Court were to consider Petitioner's newly-asserted claim, *i.e.*, that he need show no adverse personnel action to recover under section 1983, his claim is without merit.

2. All Eleven Federal Circuit Courts, Based on this Court's Precedent, Have Held that in Order to State a First Amendment Retaliation Claim under 42 U.S.C. § 1983, the Complainant Must Demonstrate that He Suffered an Adverse Employment Action

Despite Serna's assertion of a conflict between the Fifth and other circuits regarding the inclusion of an adverse personnel action element in a First Amendment retaliation claim, all eleven federal circuit courts of appeals include this as an element in the plaintiff's burden of proof. *See, e.g., Figueroa-Serrano v. Ramos-Alverio*, 221 F.3d 1, 7 (1st Cir. 2000); *Gorman-Bakos v. Cornell Co-op Extension of Schenectady County*, 252 F.3d 545, 553 (2d Cir. 2001); *Fogarty v. Boles*, 121 F.3d 886, 888 (3d Cir. 1997); *Edwards v. City of Goldsboro*, 178 F.3d 231, 245-46 (4th Cir. 1999); *Breaux v. City of Garland*, 205 F.3d 150, 157 (5th Cir.), *cert. denied*, 531 U.S. 816 (2000); *Sowards v. Loudon County, Tenn.*, 203 F.3d 426, 431, 433 (6th Cir.), *cert. denied*, 531 U.S. 875 (2000); *Thomsen v. Romeis*, 198 F.3d 1022 (7th Cir. 2000)[2]; *Bechtel v. City of Belton, Missouri*, 250 F.3d 1157, 1162 (8th Cir. 2001); *Nunez v. City of Los Angeles*, 147 F.3d 867, 874-75 (9th Cir. 1998); *Withiam v.*

---

2. The Seventh Circuit's approach has been somewhat split. *Compare McPhaul v. Board of Comm'rs of Madison County*, 226 F.3d 558, 566 (7th Cir. 2000), *cert. denied*, 121 S. Ct. 1358 (2001), *with Powers v. Summers*, 226 F.3d 815, 820 (7th Cir. 2000) (appearing to reject adverse employment action element in section 1983 claim, though following with statement that action taken by government must be "sufficiently adverse to deter the exercise" of constitutional rights).

Baptist Health Care of Oklahoma, Inc., 98 F.3d 581, 583 (10th Cir. 1996); *Rogers v. Miller*, 57 F.3d 986, 992 (11th Cir. 1995).

The genesis of each holding can be traced back to the decisions of this Court in the context of First Amendment retaliation claims made by public employees, all of which involved, and some expressly acknowledged the need for, an adverse employment action. *See Waters v. Churchill*, 511 U.S. 661, 665-66 (1994) (involving *discharge* of government employee for allegedly criticizing hospital administration); *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 73 (1990) (expressing concern over employees being placed in "dead-end positions" with no opportunity for progress, which the Court explained would be adverse); *Rutan*, 497 U.S. at 99-100 (Scalia, J., dissenting) (referencing the requirement of an adverse employment action and citing to both *Pickering* and *Connick*); *Rankin v. McPherson*, 483 U.S. 378, 395 (1987) (Scalia, J., dissenting) (recognizing that First Amendment protects against "adverse personnel decision[s]"); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 282-83 (1986) ("Denial of a future employment opportunity is not as intrusive as loss of an existing job"); *Connick v. Myers*, 461 U.S. 138, 140, 142 (1983) (assistant district attorney *discharged* for circulating a questionnaire concerning internal office affairs; explaining that "state cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression"); *Givhan v. Western Line Consol. Sch. Dist.*, 439 U.S. 410, 411-12 (1979) (teacher *dismissed* following conversations with principal); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 283-84 (1977) (action taken against the employee was a *decision not to rehire* him based on constitutionally-protected speech); *Perry v. Sindermann*, 408 U.S. 593, 595 (1972) (*nonrenewal of employment contract* alleged to be based on public criticism of college administration); *Pickering v. Board of Educ.*,

391 U.S. 563, 564, 572 (1968) (teacher *dismissed* for sending letter to local newspaper criticizing schools' past revenue proposals; "it is essential that [teachers] be able to speak out freely on such questions without fear of retaliatory dismissal").

Relying on footnote 8 in this Court's *Rutan* decision, Petitioner asserts that section 1983 provides a claim "even [for] an act of retaliation as trivial as failing to hold a birthday party for a public employee . . . when intended to punish her for exercising her free speech rights." *Rutan*, 497 U.S. at 75 n.8. However, courts have come to terms with the statement in *Rutan* as dictum. For example, in *Colson v. Grohman*, 174 F.3d 498, 510-11 (5th Cir. 1999), the Fifth Circuit explained why this statement should not control. First, the Supreme Court was quoting the lower court in *Rutan*, which in turn was erroneously characterizing its own decision in *Bart v. Telford*, 677 F.2d 622 (7th Cir. 1982). Furthermore, the Fifth Circuit recognized that the body of the *Rutan* opinion stressed that the case before it involved "significant penalties . . . imposed for the exercise of rights guaranteed by the First Amendment." *Colson*, 174 F.3d at 511. Thus, the Fifth Circuit requires more than a trivial act to establish constitutional harm. *Id. See also Lybrook v. Members of Farmington Mun. Schs. Bd. of Educ.*, 232 F.3d 1334, 1340 (10th Cir. 2000) (explaining that *Rutan*'s footnote 8 has been interpreted as non-controlling dicta). Following Serna's lead, every unwanted glance would rise to a constitutional violation if based on what an employee said. *But see Ingraham v. Wright*, 430 U.S. 651, 674 (1977) ("There is, of course, a *de minimis* level of imposition with which the Constitution is not concerned").

Moreover, the decision in *Serna* echoes the concerns expressed by this Court against subjecting every decision made by a government employer to federal court scrutiny. *Rankin v. McPherson*, 483 U.S. 378, 384 (1987) (explaining

that "public employers are *employers*, concerned with the efficient function of their operations; review of every personnel decision made by a public employer could, in the long run, hamper the performance of public functions"); *Connick*, 461 U.S. at 143 ("government offices could not function if every employment decision became a constitutional matter"); *Bishop v. Wood*, 426 U.S. 341, 349 (1976) (federal courts are "not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies").

A major problem with Petitioner's argument is that, on the one hand he recognizes that *Pickering* requires government action that is sufficiently severe that it could be said to inhibit speech, while on the other he rejects an analysis that requires the government's action to be "adverse." If the action is not adverse, it does not have the potential to chill speech. In fact, Petitioner goes so far as to argue that *Pickering* and its progeny require only that courts determine whether the speech is of public concern and then whether the government's interests as employer outweigh the individual's interests. That analysis completely omits any requirement that speech be chilled. Petitioner also erroneously implies that the Fifth Circuit rejects the inclusion of transfers as potentially adverse employment actions. The circuit's precedent demonstrates otherwise. *See, e.g., Click v. Copeland*, 970 F.2d 106 (5th Cir. 1992). Instead, the Fifth Circuit, acknowledging that transfers have the potential to chill speech, ultimately determined that Petitioner's transfer was not adverse as a matter of law, distinguishing its earlier decisions. Moreover, the "adverse personnel action" element is key to determining whether the employment action was intended to be punitive. *See, e.g., Pierce v. Texas Dep't of Criminal Justice*, 37 F.3d 1146, 1150 (5th Cir. 1994), *cert. denied*, 514 U.S. 1107 (1995). Finally, as explained below, Petitioner's request for review boils down, not to a wish that First Amendment law be reviewed generally, but to a desire

simply that his own transfer be deemed adverse. *See* Petition at 10-11 (discussing allegations confined to police departments) and at 16-17 (complaining that an earlier Fifth Circuit case held a transfer, "much less egregious" than his own to be adverse).

3. Serna Argues that the Fifth Circuit Failed to Properly Apply *Reeves*, Though His Ultimate Complaint Is That the Fifth Circuit Refused to Indulge in Speculation and to Base Its Decision on Serna's Subjective Perception of Harm

In *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000), this Court addressed the appropriate standard and scope of review in the context of Rule 50 motions for judgment as a matter of law and analogous Rule 56 motions for summary judgment. This Court held that an appellate court, in reviewing such motions, "should review all of the evidence in the record" and "must draw all reasonable inferences in favor of the nonmoving party," though the court "may not make credibility determinations or weigh the evidence." *Id.* "Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe." *Id.* at 151. "That is, the court should give credence to the evidence favoring the nonmovant as well as that 'evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses.' " *Id.*

In setting forth this standard, the *Reeves* Court relied upon, and in fact quoted from, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254-55 (1986), and also cited the Fifth Circuit's decision in *Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969) (en banc). Thus, contrary to Petitioner's implications, the standard of review in this context has been clear for many years and need not be reaffirmed again only

one year after *Reeves* was decided. Nor is the Fifth Circuit's partial quote from *Reeves* demonstrative of a misunderstanding or misapplication of the appropriate standard of review. In *Serna*, the Fifth Circuit quoted the critical portion of *Reeves*, and it need not have set forth the *Reeves* Court's entire discussion in order to stem an attack on its decision.

The only relevant inquiry is whether the Fifth Circuit properly applied *Reeves*, not whether it correctly quoted the standard, and the opinion demonstrates that the Fifth Circuit meticulously reviewed all of the evidence in the record giving credence to it where credence was due. Moreover, Petitioner's briefing of the review standard shows that it is he who misunderstands its application. Petitioner emphasized that part of the *Reeves* standard, explaining that an appellate court must give credence to the evidence favoring the moving party that is uncontradicted and unimpeached, *at least to the extent that that evidence comes from disinterested witnesses*. Petitioner understands this phrase to mean that only testimony from disinterested witnesses could be considered. However, the passage, by its express language, leaves open the possibility that uncontroverted testimony from an interested witness could be given credence. *Wilcox v. State Farm Mut. Auto. Ins. Co.*, 253 F.3d 1069, 1070-71 (8th Cir. 2001).

Petitioner also misconstrues case law regarding whether employees are considered interested witnesses for purposes of the *Reeves* standard of review. Neither *United States v. Bayer*, 331 U.S. 532 (1947), a criminal case, nor *Thurber Corp. v. Fairchild Motor Corp.*, 269 F.2d 841 (5th Cir. 1959), stand for the proposition that the testimony of an employee will be considered testimony of an interested witness, and thus discounted, in the context of the standard of review for a Rule 50 motion. Furthermore, in *Kuykendall v. United Gas Pipe Line Co.*, 208 F.2d 921, 923-24 (5th Cir. 1953),

the Fifth Circuit, relying on Texas and federal case law, held that the testimony of witnesses could not be disregarded by the jury simply because they were employees of the defendant. *Citing Pennsylvania R. Co. v. Chamberlain*, 288 U.S. 333, 394 (1933).

In any event, the only evidence offered by Petitioner to satisfy the adverse personnel action element was his own speculation and subjective perception. While the nonmovant in the context of a Rule 50 motion receives the benefit of all reasonable inferences that may be drawn from the evidence, "those inferences may not be based solely on speculation." *Clark v. Long*, 255 F.3d 555, 557 (8th Cir. 2001); *see also Intercity Maint. Co. v. Local 254, Service Employees Int'l. Union*, 241 F.3d 82, 86 (1st Cir.), *petition for cert. filed*, 70 U.S.L.W. 3036 (U.S. May 14, 2001) (No. 00-1764). Moreover, this Court and other circuit courts have consistently required a plaintiff to offer more than his subjective perception of harm as evidence of discrimination or retaliation. *See, e.g., Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) ("Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment — an environment that a reasonable person would find hostile or abusive," is beyond the purview of the ADEA); *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972) ("[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm"); *Ramos v. Davis & Geck, Inc.*, 167 F.3d 727, 731 (1st Cir. 1999) (objective standard applies to determine whether constructive discharge occurred); *Garber v. New York City Police Dep't*, 159 F.3d 1346 (2d Cir. 1998) (unpublished) (subjective perception insufficient to establish claim pursuant to section 1983); *Harlston v. McDonnell Douglas Corp.*, 37 F.3d 379, 382 (8th Cir. 1994) (refusing to allow plaintiff's subjective perception to control whether reassignment was materially adverse).

The objective evidence demonstrated that Petitioner received the same pay and benefits after the transfer that he had received before the transfer. (RR 1687-90) Thus, Petitioner's transfer was a lateral transfer, not a demotion. (RR 1642) In fact, Serna testified that "[t]he only different way that I was treated, sir, is that I was transferred involuntarily." (RR 333) Nothing negative regarding the transfer was ever placed in Serna's personnel file. (RR 826-27) He remained assigned to the same Central Substation. (RR 169, 186-87, 330-31) Although Serna offered opinion testimony that he was transferred to a "less prestigious" unit, others testified that this was not the case. (RR 1150, 1234, 1482, 1642) Serna even acknowledged that wanting to work in the downtown unit from which he was transferred was an individual preference. (RR 338) Serna conceded that he has never sought a transfer from his present assignment to another unit nor asked for a different shift. (RR 338-39, 341) Although Serna testified that he was labeled as a "silent instigator" and that this label followed him and prevented a promotion, Serna never identified any officer who held this opinion of him nor any officer who thought less of his abilities. (RR 170, 175, 415, 440, 517-18, 666-67, 719) The transfer had no effect on Serna's ability to promote, per the terms of the collective bargaining agreement. (RR 524-25, 828, 1703; PX 2) All record references characterizing Serna's transfer as adverse were to Serna's own testimony. (RR 166, 168, 169, 333, 337, 341)

A review of Petitioner's discussion of the evidence presented on this claim reveals that he wants a rehearing of what he has claimed elsewhere is an issue that must be decided on a case-by-case basis. This Court sits neither to give the defeated party in the lower appellate court another hearing, nor to resolve issues of importance to the individual litigants alone, but rather to decide cases "involving principles the settlement of which is of importance to the public, as distinguished from that of the parties." *Rice v.*

Sioux City Mem'l. Park Cemetery, 349 U.S. 70, 73-75, 79 (1955); *Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923); *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923). *See also United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts").

Furthermore, Petitioner once again argues an issue he has not preserved. Nowhere in his issues presented does he challenge the adverse personnel standard employed by the Fifth Circuit, apart from its inclusion as an element in the first instance. Not only must an issue generally be raised below to preserve it for review by this Court, but a Petitioner must present the question for this Court's review in its petition for certiorari. *Izumi Seimitsu Kogyo Kabushiki Kaisha v. United States Philips Corp.*, 510 U.S. 27, 28 (1993) ("In order to reach the merits of this case, we would have to address a question that was neither presented in the petition for certiorari nor fairly included in the one question that was presented. Because we will consider questions not raised in the petition only in the most exceptional cases, and because we conclude this is not such a case, we dismiss the writ of certiorari as improvidently granted"). As this Court recognized in *Izumi*, Supreme Court Rule 14.1(a) cautions that "[o]nly the questions set forth in the petition, or fairly included therein, will be considered by the Court." *Id.* at 30-31. "Faithful application will . . . inform those who seek review here that we continue to strongly 'disapprove the practice of smuggling additional questions into a case after we grant certiorari.' " *Id.* at 34. *See also Chandris, Inc. v. Latsis*, 515 U.S. 347, 353 n.* (1995) (same).

In any event, Petitioner presents no conflict requiring this Court's resolution. First, Petitioner asserts a conflict between the Fifth Circuit's decision in *Serna* and other Fifth Circuit case law, specifically *Sharp v. City of Houston*, 164 F.3d 923 (5th Cir. 1999); *Southard v. Texas Bd. of Criminal*

Justice, 114 F.3d 539 (5th Cir. 1997); *Forsyth v. City of Dallas*, 91 F.3d 769 (5th Cir. 1996), *cert. denied*, 522 U.S. 816 (1997); *Click v. Copeland*, 970 F.2d 106 (5th Cir. 1992); *Fyfe v. Curlee*, 902 F.2d 401 (5th Cir.), *cert. denied*, 498 U.S. 940 (1990). This Court's jurisdiction does not extend to resolve the internal conflicts of a particular circuit court, *Davis v. United States*, 417 U.S. 333, 340 (1974), and, in any event, the Fifth Circuit meticulously detailed its decisions regarding this element of a section 1983 claim in the *Serna* decision itself. Petitioner also asserts that the decision in *Serna* conflicts with decisions from the Third and Seventh Circuits, namely *Hampton v. Borough of Tinton Falls Police Dep't*, 98 F.3d 107 (3d Cir. 1996) and *McGill v. Board of Educ.*, 602 F.2d 774 (7th Cir. 1979). However, this Court's review is confined to cases "where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals." *Layne*, 261 U.S. at 393. *Serna*, *Hampton*, and *McGill* all agree on the governing legal principles, and distinctions can be made between the circumstances involved in each case. *Hampton*, 98 F.3d at 116; *McGill*, 602 F.2d at 779-80.

4. Serna Has Failed to Properly Raise an Issue Regarding the Timing of Respondents' Rule 50 Motion

Petitioner raises another argument in the body of his petition that he did not present in his questions to this Court. As a result, he has waived review. *Izumi*, 510 U.S. at 28. Moreover, Petitioner's one-paragraph reference to the timing of the Rule 50 motion, near the end of its petition for writ of certiorari, is wholly inadequate to raise the issue for this Court's review. *See Daniels v. Williams*, 474 U.S. 327, 341 n.17 (1986) (holding that state-action objection in one sentence constitutes nothing more than a bare reference, which is inadequate to mount a challenge). In any event, the Fifth Circuit explained that the purposes of Rule 50 were met where Respondents raised numerous challenges to the

sufficiency of the evidence and reasserted those challenges before the jury returned with a verdict, and also relied on the district court's express rejection of Petitioner's waiver argument. *Serna*, 244 F.3d at 481-82. There was no error. *See also Streber v. Hunter*, 221 F.3d 701, 721 (5th Cir. 2000); *Quinn v. Southwest Wood Prods., Inc.*, 597 F.2d 1018, 1025 (5th Cir. 1979).

5. Respondents Raised a Number of Other Grounds Below, Any One of Which Would Support the Fifth Circuit's Decision and Judgment

In the Fifth Circuit, Respondents raised a number of other legal bars to Petitioner's claims pursuant to section 1983, all of which would support the Fifth Circuit's judgment rendering judgment in favor of Respondents or, at the very least, a new trial. Among those arguments were that: (1) there was no decision by someone with final policymaking authority; (2) Petitioner did not speak on a matter of public concern; (3) Petitioner did not offer proof of a constitutionally-protected association; (4) Respondents' interest in promoting public service outweighed Petitioner's free speech and free association concerns; (5) no causal connection existed between Petitioner's transfer and any constitutionally-protected activity; (6) Chief Philippus was entitled to qualified immunity as a matter of law; and (7) Petitioner cannot recover a monetary award for the abstract value of a constitutional right.

A municipality may not be held vicariously liable for the actions of its employees in a suit brought under section 1983, but, rather, liability will attach only if an injury is caused in the execution of a local government's policy or custom. *Monell v. City Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 694 (1978). A single action by a municipal official can constitute the official policy of the municipality only if the municipal official possesses final

policymaking authority regarding the action in question. *McMillian v. Monroe County, Ala.*, 520 U.S. 781, 784-85 (1997). Where top-level employees' decisions are subject to meaningful administrative review, their decisions are not final, and these employees are not considered to have final policymaking authority. *See, e.g., Hill v. Clifton*, 74 F.3d 1150, 1151 (11th Cir. 1996) (holding that where City Manager, rather than Police Chief, had final policymaking authority, there could be no liability because City Manager did not approve basis for Police Chief's actions). The collective bargaining agreement between the City of San Antonio and the San Antonio Police Officers' Association expressly states that the Chief's transfer of employees within the Department is subject to review by the City Manager. (PX 2 at 18) Thus, Chief Philippus did not have final policymaking authority, and, as a result, there can be no municipal liability under section 1983 for his decision to transfer Serna from the DFU.

Nor did Serna speak on a matter of public concern. *Connick*, 461 U.S. at 142. The catalyst for Serna's transfer was his reputation for insubordination and disruption of police protocol. (RR 1528) The content of Serna's alleged complaints were largely personal, made from the perspective of an employee dissatisfied with his employment situation. His apparent problem was not with Griffin's orders *per se*, but with the fact that they came from Griffin. Serna testified that he was trying to settle the dispute he had with his supervisors within his own unit. (RR 270) All of his alleged complaints were made during internal police department meetings or to fellow SAPD staff, and were private. His association claim also fails to the extent he has even presented that claim for review by this Court. The First Amendment does not protect professional friendships nor the right to associate with co-employees. *Roberts v. United States Jaycees*, 468 U.S. 609, 620 (1984) ("the Constitution undoubtedly imposes constraints on the State's power to control the selection of one's spouse that would not apply to regulations

affecting the choice of one's fellow employees"). Moreover, Serna produced no evidence that he associated with other employees to discuss any alleged illegal activity within the department. *Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 548 (1987) (explaining that First Amendment preserves one's right to associate with others to pursue political and social ends).

The *Pickering* balancing test also weighs against Serna's claims. The SAPD's interest in promoting its public services outweighed any interest Officer Serna had in his speech. As explained above, Serna spoke on a matter of private concern wholly within the confines of his employment and in his capacity as an employee. Close working relationships are absolutely essential to the operation of the SAPD generally and the DFU specifically, as is demonstrated by the disruption caused by the breakdown in authority in the DFU. Serna was transferred because he was identified as a disruptive individual, encouraging insubordination in the DFU by fellow officers. This activity had the ability to impair discipline and harmony within the unit, and the evidence demonstrates that this, in fact, occurred.

Serna also failed to demonstrate a causal connection between his transfer and any constitutionally-protected activity. Serna claims to have complained to his supervisors beginning in 1993, though he was not transferred until 1996, more than three years later. (RR 210) With respect to the alleged July 1995 report, Serna acknowledged that he suffered no retaliation, even as he perceived it, until 1996. (RR 264-65) Serna admitted that he has no evidence that any of his complaints ever made their way to Chief Philippus or that anyone conspired to transfer him. (RR 296-97, 310-13) No one testified that retaliation was the reason for Serna's transfer, and many who testified made clear that they knew of no report by Serna of any illegal activity and that, in any event, they never communicated to Chief Philippus that Serna

had made a report of any illegal activity. (RR 102, 388-89, 407, 483, 700, 893-903, 911, 930-31, 933, 1001, 1024, 1369-70, 1372-73)

The members of the committee testified that Chief Philippus never targeted Serna, that the Committee never considered any report Serna allegedly made of illegal activity, and that the Committee recommended the transfers to alleviate the discord in the DFU; the transfers were not intended as punishment, and the recommendation to transfer Serna was not based upon any reports of violations of law made by Serna. (RR 1445-46, 1450-51, 1482, 1497-99, 1500, 1517-18, 1528, 1543-44, 1578, 1590-1601) Deputy Chief Ortiz, who headed the Committee, interviewed Captain Rudy Vernon. (RR 1625) During that interview, Captain Vernon never told him about any reports of violations of law made by Serna, and, in fact, Serna's name was never mentioned. (RR 1625-26) Ortiz also testified that there were no discussions during the committee meetings, including one with Chief Philippus, of Serna having made any reports of violations of law, and there was no discussion that Serna needed to be silenced or retaliated against. (RR 1632-33) The transfer was recommended in the interest of the department and was not intended as punishment. (RR 1633)

Additionally, numerous other officers, such as Officers Lynn, Vela and Froelick and Detective Mares testified that they made complaints similar to those Serna allegedly made but were never transferred. (RR 407, 414-18, 450, 516-17, 548-49, 567, 680-82, 701) Officer O'Connor testified that Serna was no more vocal about Griffin's orders than other officers who were not transferred out of the unit. (RR 134-35) Other officers testified that either they had no idea why Serna was transferred or affirmatively corroborated that the reason for Serna's transfer was his unprofessional conduct in encouraging disruptive behavior in the unit — conduct not at all related to alleged violations of citizens' civil rights. (RR 1025-26, 1174-77, 1191, 1193-94, 1229, 1238, 1247-50, 1284-87)

Based on the foregoing, Chief Philippus established that he acted in good faith as a matter of law and was entitled to qualified immunity as to all claims against him. The doctrine of qualified immunity provides that certain public officials who perform discretionary governmental functions should not be faced with civil rights litigation unless there is a showing that the official's conduct violated clearly established constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). In the present case, there is no evidence to support a violation of any constitutional right. Furthermore, there is no evidence to support that any action taken by Chief Philippus violated any constitutional right of Serna, nor that Chief Philippus should have understood that the transfer of Serna would have violated any constitutional right. Chief Philippus was and is entitled to qualified immunity as to all claims against him as a matter of law.

Finally, damages based on the abstract value of constitutional rights are not a permissible element of compensatory damages in section 1983 cases. *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 310 (1986). The basic purpose of section 1983 is to compensate persons for actual injuries that are caused by deprivations of constitutional rights. *Id.* at 307. Because no compensatory damages can be awarded for constitutional violations in the absence of proof of actual injury, the abstract value of a constitutional right may not form the basis for section 1983 damages. *Id.* at 308. The special issues submitted to the jury asked only if Serna's rights were violated and for an amount of money to compensate him, without any reference to retaliation or elements of damage or injury. (CR 780, 782, 785, 787) As such, they allowed for an improper award of damages.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

JACQUELINE M. STROH
Counsel of Record
CROFTS & CALLAWAY
A PROFESSIONAL CORPORATION
112 East Pecan Street
Suite 800
San Antonio, TX 78205-1517
(210) 299-0289

DEBORAH LYNNE KLEIN
OFFICE OF THE CITY ATTORNEY
ASSISTANT CITY ATTORNEY III
P.O. Box 83996
San Antonio, TX 78283-3966
(210) 207-8950

MARK KOSANOVICH
FITZPATRICK & KOSANOVICH, P.C.
P.O. Box 831121
San Antonio, Texas 78283
(210) 207-7259

Attorneys for Respondents